

Civilian population and the Norwegian Criminal Statute 2005 §102



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Problem: What are the requirements for a group to be considered a civilian population (sivilbefolkning) according to the Norwegian Criminal Statute (Straffeloven) 2005, §102?

(Hva skal til for at en gruppe blir regnet som en sivilbefolkning etter Straffeloven 2005 §102?)

1. Introduction

The Norwegian Criminal Statute (Straffeloven) 20th May 2005, no. 28 §102 is about crime against humanity (forbrytelse mot menneskeheten). Because it is such a recent statute (it was made into law 20th May 2005 and it came into force from 7th March 2008), not a lot of Norwegian legal literature or court cases have been written about it or taken place, this also because it refers to acts that are uncommon in a peaceful democracy like Norway. (This has somewhat been altered through the attack on Utøya in Norway on 22nd July 2011.) NOU-2002-04, which arguably is the most important of the preparatory works (forarbeidene) of the section, refers to article 7 of the Rome Statute of the International Criminal Court. Thus it is important to take into account the Rome Statute, as well as the court cases before International Criminal Court (ICC). (The Rome Statute is the treaty that established the ICC.) Court cases from ICC that are relevant for crimes against humanity are the cases concerning Uganda, the Democratic Republic of Congo, Darfur in Sudan, the Republic of Kenya, the Central African Republic, Libya and the Ivory Coast (Côte d'Ivoire). Other cases from other international courts that are of interest are the Nuremberg trials, the Truth and Reconciliation Commission in South Africa, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). It is worth looking into

these cases also because the ICC is a relatively new institution (it came into being on 1st July 2002, at the same time as the Rome Statute entered into force, while the Rome Statute was adopted on 17th July 1998), and therefore does not have a long history of court cases. Another reason it is necessary to look into international court cases, is that the issue is, primarily, of international character.

When examining the term 'civilian population' in Strl. §102 it is important to follow and use the sources of law (rettskildefaktorer fra (rettskildelæren)). First the Strl. §102 must be examined, looking first at the linguistic meaning of the words that constitute the term, to better understanding the legal meaning. Then the preparatory works must be examined, and the one of importance here is NOU-2002-04, and it points to the Rome Statute of the ICC. Because this preparatory work refers to the Rome Statute, i.e. the treaty of an international tribunal, it is also natural to examine cases from other international tribunals that also deal with crimes against humanity. Thus the cases (rettspraksis) from international tribunals that are based on treaties or statutes that contains sections about crimes of humanity, including the ICC, must be examined. It is also worthwhile to look into opinions (rettsoppfatninger) in legal theory, though not legal theory has been written exactly about the term 'civilian population'. Assessment of the term (reelle hensyn) can also play a part in the understanding of the term. Through this process a more thorough interpretation and understanding of the term 'civilian population' may be achieved.

The attack on AUF (Arbeiderpartiets Ungdomsfylking – the Norwegian Labor Party's youth organization) on Utøya in Norway on 22nd July 2011, is also worth looking into, and the attack has made the issue of crime against humanity and what a civil population

is, topical. Straffeloven (Strl.) §102 could arguably be applied in that case. However it is worth noticing that it is still undecided by the court whether the perpetrator, Anders Bering Breivik, should be considered criminally insane (strafferettslig utilregnelig) or not. If he is, he cannot be sentenced to imprisonment, but the section could still have been relevant, because it would still be necessary to prove that he transgressed against all of the components of Strl. §102, and he could be sentenced to compulsory mental health care (tvungent psykisk helsevern) (Str. 1902 §39, first paragraph), as long as he would be considered psychotic (psykotisk) when the offence took place (Strl. 1902 §44, first paragraph). The question would be, among the other conditions, whether the AUF-camp could be seen as a civilian population. But even if Strl. §102 could have been used, the prosecution's indictment in fact uses other sections that have been considered to be closer to the acts committed by the offender.

The issue being discussed in this thesis is what constitutes a "sivilbefolkning" (civilian population) in Strl. §102 – it will be debated what falls into this category so that the perpetrator can be tried for crimes against humanity, and what falls outside. This raises the question of what characteristics a civilian population has. The first part of the term is "civilian". What is considered civilian? Could for example a military population also be seen as a civilian population when under attack, if the attacked population was not acting in a military capacity, but a civilian? It is also worth noting who can be considered civilian and who, for example, military – the prime minister of Norway might be seen as a civilian, but the king of Norway as military. The second part of the term civilian population, is "population". The question is whether the population needs to be of a certain size, and where the line should be drawn between a larger population and a population so small that what was committed against that population cannot be

considered a crime against humanity. The characteristic of “civilian” also plays in when considering the word “population”. The term “civilian population” must anyway be considered as separate words, but also together as a complete term, carrying (a) specific meaning(s), i.e. the words must be interpreted in their context.

For someone to be sentenced for a crime against humanity, the action, according to Strl. §102, has to be “ledd i et utbredt eller systematisk angrep” – part of a widespread and systematic attack. This means that the actions mentioned in letter a to k in the section, and which may be seen as equally grave, are not considered crimes against humanity as long as they are not part of a widespread and systematic attack. This even if they might be considered war crimes (if they were committed during armed conflict). The discussion in this thesis will be limited against a wider discussion of the other conditions in the Strl. §102, as well as against a thorough discussion of the section’s letters a to k.

In the field of criminal law, the principle of legality (legalitetsprinsippet) is of great importance, because in this field decisions and sentences often have wide-ranging impact. It is a constitutional principle, and it is important for a state under the rule of law (rettsstat). Through the principle of legality no one can be sentenced without the legal authority (hjemmel) of a statute (lov), this according to Norwegian Constitution (Grunnloven) §98. It can also be said in the way that the state cannot intervene in the citizens’ legal spheres (borgernes rettssfære) without the legal authority of a statute. It must be kept in mind when dealing with Str. §102, because the interpretation of term ‘civilian population’ in the section cannot be too wide or liberal (utvidende tolkning), so as not to have basis in the wording of the text. However, the understanding of the term

can be stricter (innskrenkende tolkning). Because of this, the problem under debate – what constitutes a civilian population according to the Strl. 2005 §102 – must take as its starting point and be faithful to the wording of this section in the Norwegian Criminal Statute (Strl). The Rome Statute and legal texts can only be an aid, while the emphasis has always to be on the wording in Strl. §102.

One important difference between war crimes and crimes against humanity is that crimes against humanity can only be committed towards a population who can in some way be considered civil, while war crimes can be committed also against non-civil populations, for example prisoners of war (POW). Because of this, the word “sivil” (civilian) in “civilian population” is of vital importance to distinguish between war crimes and crimes against humanity, and this is useful because the two crimes are often committed during armed conflict in concert, but crimes against humanity can also be committed outside of armed conflict.

There is a difference between Strl. §102 and article 7 in the Rome Statute. (Article 7 is referred to in NOU-2002-04. Ny Straffelov §16-3.) While Strl. §102 talks about the crime has to be “part of a widespread and systematic attack directed against a population” (“...ledd i et utbredt eller systematisk angrep rettet mot en sivilbefolkning...”) as such, while the Rome Statute article 7 also demands that the perpetrator did so “with knowledge of the attack”. This is an added condition that has no equivalent in Strl. §102, and making the application of the article 7 more difficult, because it also demands knowledge of this widespread and systematic attack against a population. NOU-2002-04 §16-3 (and §7-5) demands instead a normal condition of intent (alminnelig forsettskrav). This is a difference worth noting. Even though it is important to look at the

Rome Statute (as NOU-2002-04 does), it is important to remember this difference, because whether crime against humanity is applicable to the same event according to the laws of the ICC and Norwegian law, can vary. It is more likely that under Norwegian law an attack would be considered a crime against humanity than under ICC. The Rome Statute helps to guide the interpretation of Str. §102, and under Norwegian law as here discussed it is the Norwegian section that is decisive.

2. About the interpretation of the word 'population' in the term 'civilian population'

On a general note, within international law, it can be stated that the population has to be of a certain size, but that it does not need to be the entire population of a state or a territory. The international law is of importance when interpreting the term 'civilian population' in Strl. §102 because of the preparatory work NOU-2002-04, and the principle of presumption (it will be discussed later). Kriangsak Kittichaisaree writes that “‘(t)he ‘population’ element does not mean that the entire population of a given State or territory must be targeted; it is intended to indicate the collective nature of crimes against humanity that excludes single or isolated acts punishable as war crimes or crimes against municipal law not rising to the level of crimes against humanity.”¹ The word ‘population’ in ‘civilian population’ has, in other words, to be understood as that the member or members targeted belong to a specific group, for it to be a crime against humanity. Kittichaisaree continues: “The targeted population must be predominantly civilian in nature although the presence of certain non-civilians in their midst does not change the character of that population. In other words, the individual victim is

¹ Kriangsak Kittichaisaree, *International Criminal Law*, Oxford University Press: Oxford, 2001, p. 95.

victimized because of his membership of a civilian population targeted by the accused.”² For the ‘civilian population’ term to be fulfilled this (civilian) group has to exist within and among the group that is targeted, but this group could also contain individuals that do not belong to this population, or also contain other populations.

3. The hypothetical situation with the bombing of a city containing civilians

An interesting hypothetical situation is when for example a city is bombed. To look into this type of situation can help to highlight when Str. §102 and its condition ‘civilian population’ can be used. Will Strl. §102 be applicable in that the civilians that inhabited the city can be seen as a “civilian population” (“sivilbefolkning”)? And what if there in this city has no or little military forces? Instances in history from the 20th century when similar events took place include the bombing of Dresden in Nazi-Germany by the allies (the British Royal British Air Force (RAF) and the United States Army Air Force (USAAF)) from 13 to 15 February 1945 (towards the end of the Second World War), with 3,900 tons of incendiary devices and high-explosive bombs. Also, the allies dropped atomic bombs on the Japanese cities of Hiroshima (on 6 August 1945) and Nagasaki (on 9 August 1945), during the latter stage of the Second World War.

Depending on the size of the city, it will most likely be inhabited by different groups of people with different affiliations and identities, i.e. defining characteristics. The larger the city and the more inhabitants, the more likely is it that it will have more and bigger groups, all with different defining characteristics. This could mean that some civilian groups could fulfill the condition of (“civilian) population”, but others possibly not, so

² Ibid., p. 95.

that “crimes against humanity” in Strl. §102 could be seen to have been committed against some groups/populations but not against others. This could also lead to the hypothetical situation where a city containing civilians were bombed, but there was committed no crimes against humanity, because there existed no sufficiently strong distinguishing characteristic(s) within and/or between the groups for any to be considered civilian populations. But it is highly unlikely that something like that would occur, and it therefore remains a faint hypothetical situation, because one, and probably several, distinguishing characteristic would exist within or between different groups. And war crimes could possibly be applicable anyway.

4. The Norwegian Criminal Statute (Straffeloven) §102, dualism and possible sector-monism

Norwegian law primarily adheres to the principle of dualism in relation to international law. This is of relevance in relation to Strl. §102, because of the section’s connection with international law. According to this principle of dualism, national and international law are seen as two separate systems. If one, according to this principle, is to apply the international law within national law, it has to have been made part of the national law (unless it is not in conflict with national law). If it is in conflict with national law, it is the national law, and not the international law, that is applicable. It is not enough that the state has become a party to for example an international treaty, for the international treaty or law to be directly applicable within national law; it has to have been directly been made a part of it. This can be achieved either through incorporation or transformation. Incorporation refers primarily to when national law makes a reference to the international law, stating that the international law is applicable.

Transformation refers primarily to when international law is made into national law through written reproduction of sections of the treaty in sections of Norwegian law.

Because dualism is the main principle in Norwegian Law, Strl. §102 follows this principle as well. Still, regarding its interpretation the preparatory work NOU-2002-04 refers to article 7 of the Rome Statute of the ICC. Does this then mean that this section does not adhere completely to the principle of dualism, and is it in fact an example of sector-monism?

Monism is another principle of international law, where the principle is that international and national law are part of the same system of law. If, for the interpretation, of Str. §102, it is necessary to look to international law according to the preparatory works, it would seem that it is an application of monism within the larger dualistic Norwegian law system. This is often called sector-monism. But it is worth mentioning that dualism is not an absolute principle within Norwegian law. There are some modifications, including the fact that Norwegian law should be interpreted with the idea that Norwegian law is presumed to be in compliance with international law. (But where international law and Norwegian law is in conflict, Norwegian law still has to be followed).

The idea that Norwegian law is presumed to be in compliance with international law (presumsjonsprinsippet), is an argument for viewing the use of international law by the preparatory works of Strl. §102, as being part of the Norwegian law use/interpretation of the concept of dualism. Strl. §102 (from the new Criminal Statute/Strl. that was adopted 20th May 2005) only recently came into force (7th March 2008). Because it is so

recent, it is also more natural to use the international law of the ICC as well as court cases of the ICC, because there has been little time for this type of court cases to appear before Norwegian courts where this section is applied, and since the preparatory work NOU-2002-04 specifically refers to the Rome treaty of the ICC, it is natural to look into its court cases to interpret the section in accordance with the ICC and the principle of presumption (presumsjonsprinsippet). It must also be taken into account that Norway is a much smaller and more organized society than some other parts of the world, so it is rare that these types of cases occur in Norway, and when they do, it is natural to look to cases from international tribunals. That the preparatory work of NOU-2002-04 specifically refers to article 7 of the ICC makes it and the court cases from the ICC regarding that section directly applicable. But it is also necessary to look into cases from other international tribunals because they refer to similar cases, and will help to enlighten the application of the Norwegian section. It is also underlined through the use of the dualistic principle in Norwegian law, that Norwegian law is presumed to be in compliance with international law, as long as it is not in direct conflict with it, making court cases from international tribunals relevant in the interpretation of the section, exactly because of this presumption. This means that even *if* the preparatory works did not directly refer to the Rome Statute of the ICC, international law/court cases from international tribunals would still be applicable exactly because of this presumption of Norwegian law being in compliance with international law. But the fact that NOU-2002-04 specifically refers to the ICC, gives of course added value to the Rome Statute and its relevant court cases, but also indirectly court cases from other international tribunals.

5. Comparison between crimes against humanity and the crime of genocide

In the Norwegian Criminal Statute (Straffeloven 2005, 20. mai, Nr. 28), §101 refers to the crime of genocide (folkemord). It is worthwhile to compare this section on genocide with the section on crimes against humanity (§102) in the same law, because the two sections are similar and cover closely linked crimes. Comparing the two can help to make it clearer where one or the other (here in particular §102) is applicable. By doing this one can highlight what links the two, as well as what separates them, thus informing and making more thorough the interpretation of these sections.

Strl. §102 concerns crimes against humanity that is part of a widespread or systematic attack directed against a civilian population (“forbrytelse mot menneskeheten... som ledd i et utbredt eller systematisk angrep rettet mot en sivilbefolkning”), with different alternatives of the acts committed following these conditions. Strl. §101, on the other hand, concerns the crime of genocide, and it must be committed with the purpose to wholly or partly to destroy a national, ethnic, racial or religious group (“i hensikt helt eller delvis å ødelegge en nasjonal, etnisk, rasemessig eller religiøs gruppe”), also this section with different alternatives of the acts committed following these conditions. The word genocide was coined by the Polish legal scholar Raphael Lemkin, and the term genocide is often considered to be a specific form of crimes against humanity. An important difference between the two sections is that Strl. §102 concerns “civilian population”, while Strl. §101 concerns a “national, ethnic, racial or religious group”. Still, civilian population in §102 can encompass national, ethnic, racial or religious groups, so here there is arguably no real difference. One element that separates the two sections is that for Strl. §101 to be applicable it is necessary that the offender has acted with the intent of wholly or partly destroying such a group (“i hensikt

helt eller delvis å ødelegge en... gruppe"). Strl. §102 on the other hand, demands that the offender has committed an act that is part of a widespread or systematic attack directed against a civilian population ("...som ledd i et utbredt eller systematisk angrep rettet mot en sivilbefolkning..."). In Strl. §102 there is no equal intent on destroying the whole or part of the group/population, but there is arguably, though this is a much debated issue, an intent to direct the attack against the group/population precisely because of what type of (civilian) population, meaning that this group has a defining characteristic in that it is for example national, ethnic, racial or religious group (as §101 states). In other words, the intent in §102 (about crimes against humanity), is to direct the attack against the population exactly because of its status as a particular social population. In §101 about genocide the intent must include this element (the intent to direct (an attack) against a national, ethnic, racial or religious group), but it must also include the intent to wholly or partly destroy the group. Therefore §101 about genocide has one more element of intent than §102 about crimes against humanity. This difference constitutes the clearest difference between the two sections, and when the offender had the intent to wholly or partly destroy the group, it is possible and more natural to use section §101 (genocide) as opposed to §102 (crime against humanity), but if the offender did not have this intent then §101 cannot be used. Regarding the conditions for applying the sections, in the main, initial parts of the §101 about genocide and §102 about crimes against humanity, §101 contains as one more condition of intent (as shown).

But there is also the difference between the two sections that §102 about genocide contains a much longer list of additional, potential conditions, (§102 contains 11 (a-k), while §101 contains 5 (a-e), so that it is arguably easier to apply §102 about crimes

against humanity than §101 about genocide, because there are more situations where §102 is applicable, especially when taking into account that the main, initial part of the section contains one less condition (about intent) than §101 about genocide. And the prosecution will often choose crimes against humanity instead of genocide. Neither section has a condition of only being applicable in armed conflict, so that both can be used outside of wartime. The sections of war crimes in the Norwegian Criminal Statute (Strl. §104 - §107), on the other hand, can just be applied to armed conflicts (for example Strl. §104: “i forbindelse med en væpnet konflikt”).

6. The Trial of the Major War Criminals before the International Military Tribunal in Nuremberg

It is useful to look into the Nuremberg trial because before and during these trials the modern concept of crimes against humanity continued to form. The presumption principle and that the preparatory work of Strl. §102 refers to the statute of an international tribunal (the ICC), are other reasons why it is worth studying these cases from this international tribunal (the International Military Tribunal in Nuremberg). The first formulation of the concept came from a declaration jointly issued by the French, British and Russian Governments on 28 May 1915, in response to the mass killings of Armenians in the Ottoman Empire – they phrased it as “crimes... against humanity and civilization...”³ Most likely the phrasing was a way of trying to deal with a “short-term political problem”⁴ as Antonio Cassese points out. He underlines that they did not decide “whether by ‘humanity’ they meant ‘all human beings’ or rather ‘the feelings of humanity

³ Antonio Cassese, *International Criminal Law*, Oxford University Press: Oxford, Great Britain, 2003, p. 67.

⁴ Ibid., pp. 67, 68.

shared by men and women of modern nations' or even 'the concept of humanity propounded by ancient and modern philosophy'".⁵

The special Commission that was created after the First World War suggested to the Versailles Conference that "offences against the laws of humanity" should be included in the jurisdiction of an international criminal tribunal, but this did not take place partly because of the statements of James Brown Scott and Robert Lansing, two representatives from the United States, in their 'Memorandum of Reservations'. It stated that "crimes should be punished because 'the laws and customs of war are a standard certain'... the 'laws and principles of humanity are not certain, varying with time, place and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity'...", this "'if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law'".⁶ This memorandum convinced or hindered the Commission from including "offences against the laws of humanity" into report.

Before and during the Second World War, there existed warfare laws that had rules against transgressions against the enemy or their populations, but no rules specifically against inhuman acts performed by a nation taking part in a war, against its own citizens.⁷ The Germans had in fact committed such inhuman acts for racial or political reasons against their own population, in that Jews, gypsies, social democrats, communists, trade union members, and members of the church were targeted by the Nazi regime. At the end of the Second World War acts such as persecution for racial or political purposes, even if done against civilians of occupied territories, were not

⁵ Ibid., p. 67.

⁶ Ibid., p. 68.

⁷ Ibid., p. 68.

actually prohibited, as Antonio Cassese points out.⁸ There were some among the allies that supported the idea in 1945, of just executing the (major) war criminals, but upon the initiative of the United States, the Allies instead agreed to try them in front of a tribunal. The London Agreement embodied the Charter of the International Military Tribunal, and had a clause where the accused could be tried and possibly punished of crimes against “humanity”: “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution or in connexion (sic) with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”⁹

Criticism that has been raised against the proviso, by among others the aforementioned Cassese, is that for crimes against humanity to become applicable, it had to be within the jurisdiction of the International Military Tribunal. For this to be the case, the crimes against humanity had to be committed in connection with crimes against peace or war crimes. Cassese writes that this link “was not spelled out, but it was clear that it was only within the context of a war or of the unleashing of unlawful aggression that these crimes could be prosecuted and punished.”¹⁰ This, according to E. Schwelb, meant that just certain criminal acts were punished, such as those that “directly affected the interests of other States”¹¹ through war and or crimes against enemy combatants or enemy civilians. This excluded several potentially criminal acts, but lessened repercussions for third states.¹² But nonetheless, the new category of

⁸ Ibid., pp. 68, 69.

⁹ Ibid., p. 69.

¹⁰ Ibid., p. 69.

¹¹ E. Schwelb, “Crimes Against Humanity”, 23 BYIL (1946), p. 207, referred to in Antonio Cassese, *International Criminal Law*, Oxford University Press: Oxford, Great Britain, 2003, p. 69.

¹² Antonio Cassese, *International Criminal Law*, Oxford University Press: Oxford, Great Britain, 2003, p. 69.

“crimes against humanity” was clearly established, and would evolve further from this starting point. Cassese points out that the creation of “crimes against humanity” showed that “the international community” broadened the group of acts that could be seen as of “‘meta-national’ concern”.¹³ The idea that “crimes against humanity” propagated, was that there are essential values that are, or should be, intrinsic to any human being (“in the notion, humanity did not mean ‘mankind’ or ‘human race’ but ‘the quality’ or concept of human being”, Cassese underlines).¹⁴ This new creation also signaled that crimes could be punished even if not prohibited by national law, or as the British Chief Prosecutor, Sir Hartley Shawcross put it, there existed restrictions to the “omnipotence of the State”.¹⁵

The defendants during the Trial of the Major War Criminals before the International Military Tribunal in Nuremberg, were 24 of the most important captured leaders of the of Germany under the Nazis, so it is natural to look into the contents of this/these particular tribunal/cases among the several (parts of) the Nuremberg Trials. The tribunal used the Charter of the Nuremberg International Tribunal Article 6 (c), which concerned crimes against humanity. All the defendants were members of the Nazi Party, and according to the tribunal they “formulated and executed a common plan or conspiracy to commit Crimes against Humanity as defined in Article 6 (c) of the Charter. This plan involved, among other things, the murder and persecution of all who were suspected of being hostile to the Nazi Party and all who were or who were suspected of being opposed to the common plan alleged in Count One.”¹⁶ The common plan alleged in Count One refers to “a common plan or conspiracy to commit, or which involved the

¹³ Ibid., p. 70.

¹⁴ Ibid., p. 70.

¹⁵ Ibid., p. 70.

¹⁶ Trial of the Major War Criminals before the International Military Tribunal Nuremberg, 14 November 1945 to 1 October 1946, Published in Nuremberg, Germany, 1947, Volume 1, Official Documents, p. 65.

commission of, Crimes against Peace, War Crimes, and Crimes against Humanity, as defined in the Charter of the Tribunal..."¹⁷ A social population needs to have a distinguishing feature to fit into the definition in Str. § 102. In and of itself, the wording of "all who were suspected of being hostile to the Nazi Party and all who were or who were suspected of being opposed to the common plan..."¹⁸ is clearly too wide. More or less anyone could fall into such a broadly defined category, as is show by the word usage "all who were..." But in the official documents of the trial before the International Military Tribunal in Nuremberg, it is further stated that the persecutions "were directed against Jews."¹⁹ Here the condition of social population in regards to for example Strl. § 102 is clearly fulfilled, because Jews are a social population that has the distinguishing feature of being of a common ethnic and/or religious characteristic. Even though such a characteristic could be disputed in everyday parlance, the Jews were at least seen to have this/these common characteristics by the Nazi Party and the Nazis, and this is enough to fulfill the condition of social population in regards to Strl. § 102. It is primarily the ethnic component more than the religious one that is important, because a part of the Jews were atheists or agnostics and thus not religious as such.

7. The International Criminal Tribunal for the former Yugoslavia (ICTY)

It is worthwhile to see how international tribunals such as the ICTY handle cases that deal with crimes against humanity, because the presumption principle also makes it important to study cases from international tribunals such as the ICTY, because

¹⁷ Ibid., p. 29.

¹⁸ Ibid., p. 65.

¹⁹ Ibid., p. 66.

Norwegian law is presumed to be in accordance with international law. The preparatory work NOU-2002-04 refers to the Rome Statute of the ICC in connection with crimes against humanity, so other international tribunals that deal with the same types of crimes and cases (such as the ICTY) are useful indicators of how the condition of ‘civilian population’ is interpreted, so as to achieve a more thorough and well-reasoned interpretation of the same condition in Norwegian law. In the prosecution of the International Criminal Tribunal for the former Yugoslavia’s marked-up indictment of Radovan Karadzic it is held that Karadzic and Ratko Mladic took part in joint criminal enterprises, and “the pursuit of each of these objectives were related to the objective of the overarching joint criminal enterprise to permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory²⁰” in Bosnia and Herzegovina. The objectives of the three joint criminal enterprises they partook in were “(1) to spread terror among the civilian population of Sarajevo through a campaign of sniping and shelling, (2) to eliminate the Bosnian Muslims in Srebrenica, (3) to take United Nations personnel as hostages.”²¹

Point (1) raises the question of whether “the civilian population” of a city is precise enough to fall within the term “civilian population” in §102, because of the size of the city (Sarajevo) and the different religious/ethnic groups within it. Sarajevo was and is the capital of the state of Bosnia and Herzegovina, and was before one of the biggest cities in the Socialist Federal Republic of Yugoslavia. As of 2012 it has a population of

²⁰ Trial Chamber III, The Prosecutor vs Radovan Karadzic, Prosecution’s Marked-Up Indictment, The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (ICTY), Case No. IT-95-5-/18-PT, 19 October 2009, p. 4.

²¹ Ibid., p. 4.

311,161 people²², and when the terror was spread from approximately October 1991 to 30 November 1995 it was a city with a population of several hundred thousand people, as well. This raises the question of whether such a big population can be considered a civilian population in the context of Strl. §102. The size in itself cannot be a hindrance for viewing it as such, but because this population was the inhabitants of a city, it means that it is more probable that it contained various groups of people with different distinguishing features. In fact Sarajevo did and does contain different large religious groups such as Muslims, Catholics, Orthodox Christians and Jews. These groups could also be seen partly as ethnic. There could be other distinguishing features that connect the groups of the different religions/ethnicities together, but in this instance the most natural and strongest distinguishing feature is the ethnicity/religious affiliations. It could be argued that the different religious/ethnic groups belonging to the same city could be seen as a distinguishing feature, but this must generally be seen as a too weak connection, and especially in this instance the connection is too weak because the different religious/ethnic groups were at the time in conflict with each other, so that this potential connection/distinguishing feature is invalid. Thus, the population of Sarajevo cannot be taken as one civilian group whom terror was spread against. Arguably, the different groups could on their own be seen as social groups, but this is not the content of point (1) in the objectives of the criminal enterprise described in the ICTY indictment. Because of this, and in regards to strl. §102, the condition of civilian population is not fulfilled.

The objective of the criminal enterprise in point (2) to eliminate Bosnian Muslims in Srebrenica, is an action directly targeting a population because it consists of several

²² Wikipedia, <http://en.wikipedia.org/wiki/Sarajevo>, 01/03/2012.

individuals, and that they are in one defined geographical area could arguably strengthen the argument that they are in fact a population. They can also be considered a population because they have the distinguishing feature of both a common ethnicity (Bosnian) and a common religious identity (Islam). The population of Bosnian Muslims in Srebrenica consisted primarily of civilians, and adults and children of both sexes were among the victims. Men and boys were killed, and women, children and some elderly men were forcibly removed.²³ Therefore the part “civilian” of the term civilian population is fulfilled, and it was a civilian population that was targeted.

Point (3), which regards taking United Nations personnel as hostages, raises some interesting questions. The United Nations personnel perform duties for an international organization, and are from different nations and of different ethnicities and with different religious orientations. Therefore the question arises whether the United Nations personnel have a defining characteristic so as to be considered a population. That they all work for the United Nations could arguably be considered such a defining characteristic, but this leads to another question – whether they can be considered civilian. They were armed, and this could lead to one taking the stance that they are not civilian, but rather military. But, on the other hand, they were not engaging in the war as one party fighting against another party, but rather as peacekeepers and in a protection capacity. A population can arguably both be considered military in one situation or perspective and civilian in another. But in this instance it is more natural to view the United Nations personnel more as civilians, exactly because of them partaking in a more peacekeeping and protection capacity. They consisted of several individuals, a group,

²³ Trial Chamber III, The Prosecutor vs Radovan Karadzic, Prosecution’s Marked-Up Indictment, The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (ICTY), Case No. IT-95-5-/18-PT, 19 October 2009, p. 10, 11.

and they have the defining characteristic of being United Nations personnel, and therefore could be seen to be a population. And when also considered civilian, they would thus be a civilian population.

Under the headline “The Charges Count 1 (Persecutions)” in the third indictment against Vojislav Seselj, it is stated that from or about 1 August 1991 until at least September 1993, Seselj “acted individually or as a participant of a joint criminal enterprise, planned, ordered, instigated, committed or otherwise aided and abetted in the planning, preparation or execution of, or physically committed, persecutions of Croat, Muslim and other non-Serb civilian populations in the territories of the SAO SBWS (Slavonia, Baranja and Western Srem), and in the municipalities of Zvornik, “Greater Sarajevo”, Mostar, and Nevesinje in Bosnia and Herzegovina and parts of Vojvodina in Serbia”.²⁴ These acts constituted, according to the ICTY, transgression against Article 7-1 of the Statute of the Tribunal²⁵, and these acts were according to the ICTY “persecutions committed on political, racial and religious grounds...”²⁶

Croat and Muslim populations have (each population on their own) the defining characteristics of religion, as well as arguably politics and race. The general term of other non-Serbian civilian populations is too undefined to pass as a civilian population, because it is simple a negation of a political or ethnic defining characteristic (Serbian). The Croat and Muslim populations can, when considered on their own, be seen as civilian populations because they have these (positive) defining characteristics in

²⁴ The Prosecutor of the Tribunal against Vojislav Seselj, The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (ICTY), Case No. IT-03-67, 7 December 2007, p. 5.

²⁵ Ibid., p. 2.

²⁶ Ibid., p. 5.

common within their populations, and as long as they are civilian, they can therefore be taken to be civilian populations as such.

Milan Babic is, according to his indictment from the ICTY, “individually criminally responsible for the crimes referred to in Article 3 and 5 of the Statute of the Tribunal...”²⁷ Article 5 of the Statute of the Tribunal (ICTY) concerns crimes against humanity, and is very similar in form to Strl. §102 and Article 7 of the Rome Statute (the ICC). It states that the “International Tribunal shall have power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: a) murder; b) extermination; c) enslavement; d) deportation; e) imprisonment; f) torture; g) rape; h) persecutions on political, racial or religious grounds; i) other inhumane acts.”²⁸ All three rules concern crimes against humanity, but the greatest difference between Strl §102 and Article 7 of the Rome statute on the one hand, and Article 5 of the Statute of the ICTY on the other hand, is that in the latter it is a condition that the crime(s) against humanity is committed in an armed conflict, which is not a condition in the former two. The reason for this is most likely because the ICTY is a tribunal that deals directly with participants in a specific (armed) conflict (the conflict(s) in the former Yugoslavia), while the other two are “general” rules, in the sense that they can be applied to different situations, instances and places, not just armed conflicts. All three rules has a condition “civilian population”/“sivilbefolkning”. It is worthwhile looking into these cases before the ICTY because several of them are about crimes against

²⁷ The Prosecutor of the Tribunal against Milan Babic, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (ICTY), Indictment, Case No. IT-03-72 “RSK”, November 2003, p. 1.

²⁸ Updated Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), September 2009, p. 6.

humanity against civilian populations and transgressions against article 5 of the ICTY Statute. Even Article 5 of the ICTY Statute is about crimes against humanity and not about war crimes and other similar crimes, such as for example Article 3 of the ICTY Statute which is about “(v)iolations of the laws and customs of war...”²⁹ Even though a condition is that transgression of Article 5 takes place during armed conflict, the more significant conditions are “crimes against humanity” and “civilian population”. There are other articles in the ICTY Statute that deals with pure war crimes.

According to the ICTY indictment, Milan Babic “participated in a joint criminal exercise that came into existence no later than 1 August 1991 and continued until at least June 1992. The purpose of this joint criminal exercise was the permanent forcible removal of the majority of the Croat and non-Serb population from approximately one-third of the territory of the Republic of Croatia (“Croatia”), in order to make them part of a new Serb-dominated state through the commission of crimes in violation of Article 3 and 5 of the Statute of the Tribunal.”³⁰ The case against Babic has been concluded and a sentence has been given, and also for this it is worth looking into it, because the fact that it is not an ongoing case such as most cases that have been discussed so far, puts this case in another light. According to the legal findings in the sentence, “Babic pleaded guilty to count 1 of the Indictment alleging persecution on political, racial, and religious grounds, a crime against humanity punishable under Article 5(h) of the Tribunal’s Statute... Babic admitted the persecution of non-Serb civilians through acts of extermination or murder, imprisonment and confinement, deportation or forcible

²⁹ Ibid., p. 5.

³⁰ The Prosecutor of the Tribunal against Milan Babic, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (ICTY), Indictment, Case No. IT-03-72 “RSK”, November 2003, p. 1.

transfer...”³¹ The ICTY in other words found, through Babic’s guilty plea, that the Croat and non-Serb population must be considered a civilian population. They can be seen to have the defining characteristic of being “racially”, as the ICTY phrases it, (“ethnically” would be another way to phrase it), different from the Serb population. They can also be seen as politically as well as religiously different, thus having different distinguishing characteristics. The court does not go into explanations or extrapolations about the term “political, racial or religious”, and does not attempt to separate the terms from each other, and decide which one is more appropriate. Instead it is satisfied that one, several or all of the terms/conditions are fulfilled, and if one of the defining characteristics of two different non-Serb populations are different from each other (as well as of course from the Serb population), this does not pose a problem. The non-Serb populations that were transgressed against, can in other words be considered one or several populations (with distinguishing characteristics different from the Serb population), and they must also be seen as being civilian because they were inhabitants of the areas where the transgressions against them started and they were not military. But this is not problematized in the sentencing judgment from the ICTY either. Claire de Than and Edwin Shorts point out that “Article 5 of the ICTY refers to crimes committed against *any* civilian population, irrespective of their race, nationality, religion or political status, and is therefore non-discriminatory...”³² So whatever the distinguishing characteristic of the civilian population is, it does not much matter, as long as it can be differentiated against the aggressor. They further state that “(c)ivilians include not only non-combatants, but also those who are *hors de combat* or persons not longer actively involved in the

³¹ Trial Chamber I, Prosecutor v. Milan Babic, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (ICTY), Sentencing Judgment, III. Legal findings. A. The Crime of Persecution within a Joint Criminal Enterprise, 29, 30, p. 12.

³² Claire de Than, Edwin Shorts, *International Criminal Law and Human Rights*, “Chapter 5. Crimes against humanity. The meaning of “any civilian population””, Sweet & Maxwell: London, 2003, p. 93.

hostilities. In certain circumstances it may also comprise of those persons who were at one time members of an armed resistance movement, but have not abstained from such conduct.”³³ This quotation underlines the fact that there are several different categories of persons that fit into ‘civilian population’, and even though it is not further discussed how the population of non-Serbs that were transgressed against in the Babic-case, what constitutes civilian in ‘civilian population’ is an ever returning question.

In regards to what de Than and Shorts write about ‘civilians’ including not only non-combatants, it is worth also to look into the often-mentioned scenario of a civilian defending his family with the use of a weapon. When it comes to the use of weapons, members of the military and others who carry weapons are usually not included in the ‘civilian’ part of the term ‘civilian population’, but ‘Kriangsak Kittichaisaree points out that there are exceptions to this. He writes, concerning the use of the term ‘civilian’, that it is “the situation faced by the victim (sic) at the time of the commission of the crime that must be taken into account to determine whether they have the ‘civilian’ status. For instance, where the head of a family is compelled to use arms to defend his family, he does not lose his civilian status; neither do the police or local defense force who act in this manner although they are formed in an attempt to prevent the cataclysm of armed conflicts.”³⁴ Also de Than and Shorts writes about this, and both de Than and Shorts, and Kittichaisaree refer to the ICTY case against Tihomir Blaškić before the Trial Chamber (ICTY, Blaskic, Judgment, March 3, 2000, para. 213-214), in regards to this.³⁵

³³ Ibid., p. 93.

³⁴ Kriangsak Kittichaisaree, *International Criminal Law*, Oxford University Press: Oxford, 2001, p. 95.

³⁵ Ibid., p. 95. And Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights*, Sweet & Maxwell Limited: London, 2003, P. 93.

8. The situation in Rwanda and the International Criminal Tribunal for Rwanda (ICTR)

The presumption principle makes it important to consult cases from international tribunals such as the ICTR in the interpretation of Strl. §102, because Norwegian law is presumed to be in accordance with international law. NOU-2002-04 also refers to the statute of an international tribunal (the ICC that deal with crimes against humanity), so to look into the ICTR that also deals with crimes against humanity, strengthens the interpretation of Strl. §102 and its condition 'civilian population' within Norwegian law. The International Criminal Tribunal for Rwanda (ICTR) was established by Resolution 955 of the United Nations Security Council in November 1994.³⁶ The ICTR was set up in response to the Rwandan genocide, that took place in Rwanda during approximately 100 days during 1994 (from the beginning of April to the middle of July), and estimates state the number of persons killed between 500,000 to 1 million. It grew out of a long, ongoing conflict between the minority Tutsi (who for centuries had power in the area/nation) and the majority Hutu. The killings started as a violent reaction to the killing of the country's president Juvénal Habyarimana on April 6th, with the offenders being primarily Hutus and the victims being Tutsis and pro-peace Hutus.³⁷ The ICTR's jurisdiction cover the genocide and other serious violations of international law that took place in Rwanda, as well as the country's citizens in neighboring states between January 1st to December 31st 1994. It has jurisdiction over violations of Common Article Three and Additional Protocol II of the Geneva Conventions that includes crimes against humanity, genocide and war crimes.³⁸

³⁶ Wikipedia, <http://en.wikipedia.org/wiki/ICTR>, 03/04/2012.

³⁷ Wikipedia, http://en.wikipedia.org/wiki/Rwandan_Genocide, 03/04/2012.

³⁸ Wikipedia, <http://en.wikipedia.org/wiki/ICTR>, 03/04/2012.

The case against Jean-Paul Akayesu was the first trial before the ICTR, and it began in 1997. It is worth to look into this particular case because it concerns among other crimes, crimes against humanity, but also because it being the first it worked as a kind of standard for cases that followed it in front of the ICTR (if not exactly a precedent per se). In point 167 of the Judgment it is stated that “all acts and omissions set forth in this indictment took place between 1 January 1994 and 31 December 1994, in the commune of Taba, prefecture of Gitarama, territory of Rwanda.”³⁹ Paragraph 7 of the indictment is about genocide, and in relation to it there is within the text of the Judgment a discussion of what was meant by being members of a national, ethnic, racial or religious group.⁴⁰ This is of importance in relation to paragraph 8 of the indictment that charged crimes against humanity. In reference to the indictment, point 173 of the Judgment states that crimes against humanity “were committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic or racial grounds.”⁴¹ To apply the indictment’s interpretation of crimes against humanity, it was seen as important how the crime of genocide from the indictment was applied, precisely because of how “national, ethnic or racial group” was interpreted. This would translate and be accommodated into the understanding of civilian population, and the understanding of civilian population by the ICTR, informs and underpins the interpretation of civilian population (sivilbefolkning) in Strl. §102.

Witnesses before the court testified to the fact that the acts of violence were committed to destroy the Tutsi population.⁴² This is a condition for applying the crime of

³⁹ The Prosecutor versus Jean-Paul Akayesu Case no. ICTR-96-4-T, Judgment, Chamber I, International Criminal Court for Rwanda, September 2, 1998, 5. Factual Findings, 5.1. General Allegations, Factual Findings, Point 167.

⁴⁰ Ibid., Point 173.

⁴¹ Ibid., Point 173.

⁴² Ibid., Point 168.

genocide. Of greater importance in relation to crimes against humanity is whether the victims could be seen to be a member of a national, ethnic, racial or religious group (conditions contained within the term “civilian population” in crimes against humanity). The Chamber giving the Judgment stated that “the Tutsi population does not have its own language or a distinct culture from the rest of Rwandan population.”⁴³ Even so, the Chamber did find “objective indicators” that showed the Tutsi population to be group with “a distinct identity”.⁴⁴ The Rwandan citizens were identified by, among other things, their ethnic group (either Tutsi, Hutu or Twa), according to enforced laws and Rwanda’s Constitution. Before 1994 all Rwandan citizen had to carry with them, also according to law, identity cards where what ethnic groups the different citizens belonged to, was described. The Judgment states that “Article 16 of the Constitution of the Rwandan Republic, of 10 June 1991, reads, “All citizens are equal before the law, without any discrimination, notably, on grounds of race, colour, origin, ethnicity, clan, sex, opinion, religion, or social position”. Article 57 of the Civil Code of 1988 provided that a person would be identified by “sex, ethnic group, name, residence, and domicile.” Article 118 of the Civil Code provided that birth certificates would include “the year, month, date and place of birth, the sex, the ethnic group, the first and last name of the infant.””⁴⁵ For these reasons, as well as the fact that Rwandan customary rules based on patrilineal lines of heredity decided what ethnic group an individual belonged to, individuals were clearly seen to belong to the Tutsi, Hutu or Twa ethnicities or groups.⁴⁶

From the findings and statements of the ICTR Chamber’s Judgment, it is made clear that the Tutsis were seen as an ethnic group or (civilian) population because of the fact

⁴³ Ibid., Point 170.

⁴⁴ Ibid., Point 170.

⁴⁵ Ibid., Point 170.

⁴⁶ Ibid., Point 171.

that they had been perceived as such an ethnic group through the long history in the Rwandan territory. Here it can be seen that it is enough for a group of individuals to be considered an ethnic group or (civilian) population as long as they are perceived as one. There could exist a distinguishing characteristic within the group, and such a characteristic could also exist partly because the individuals were *seen* as a population (or civilian population because the main part of the population were civilians, and therefore the individuals that were civilian could be seen as part of the civilian population). It is enough for the group to be a distinct group or population, that it is *perceived* this way, but the perception has to be constant, as well as last over time. The perception has also to be shared by a large group of people, and if this includes the members of the group or population themselves, it strengthens the idea of them being a population. The perception was culturally and historically based, but it also had a legal form, so that the perception of the Tutsis as a distinct group was many faceted and strong (and still continues to exist in Rwanda and the surrounding countries, even though the legal categorization has disappeared).

According to paragraph 8 of the indictment, the crimes against humanity “were committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic or racial grounds.”⁴⁷ For the crimes against humanity to be applicable it is precisely necessary that the attack was part of a widespread or systematic attack. The interpretation of civilian population is to some degree connected with this condition, because the two conditions depend on each other and must both be fulfilled for crimes against humanity to be applicable. But the condition of the attack being part of a widespread or systematic attack is also connected with the concept of

⁴⁷ Ibid., Point 173.

civilian population in that there are (potentially) several members of a civilian population, and for the attack to be part of a widespread or systematic attack it has to be committed against several members of the population. There is no clear minimal limit to the number of persons who has to be members of the civilian population, just as there is no clear minimal limit for victims of the attack, for the attack to be part of a widespread or systematic attack. But arguably there cannot be too few members of the civilian population, and not too few victims of the attack either, and the more precise sizes of the persons and victims must be found through court cases. The sizes of the population and the group of victims cannot be an exact or stable number. Instead it will depend on the situation what sizes are required.

9. The International Criminal Court (ICC) and the principle of complementarity

The preparatory work to the Norwegian Strl. §102, NOU-2002-04, refers to the Rome Statute of the ICC, so that cases that concerns crimes against humanity before the ICC, are a necessary help in interpreting 'civilian population' in the Norwegian section. The International Criminal Court follows the principle of complementarity, according to which the states retain the main responsibility for criminal prosecution.⁴⁸ This is the opposite from how the ICTY and the ICTR operate. These two tribunals can demand that cases be transferred to them even when the cases already have started as national court cases, and thus, at least in principle, the ICTY and the ICTR take precedence over national courts.⁴⁹ The ICC is, on the other hand, complementary.

Jo Stigen writes about the two aspects of complementarity, the tests of admissibility

⁴⁸ Morten Ruud, Geir Ulfstein, *Innføring i folkerett*, Universitetsforlaget: Oslo, 2008, p. 143.

⁴⁹ Ibid., p. 280.

and procedural discretion; "...the principle of complementarity... governs the ICC's exercise of jurisdiction. The essence of the principle is that the ICC shall only exercise jurisdiction over a case when no state proceeds genuinely with it *and* ICC interference in that particular case will serve the interests of justice."⁵⁰

With regards to the legal meaning the ICC is complementary to the national court systems, and starts functioning when national court processes are not effective or possible (in the sense that they actually do take place). The Preamble and Article 1 and 17 of the Rome Statute establish the principle of complementarity in regards to the ICC.

The principle of complementarity is of importance in relation to the Norwegian Strl. §102 (crimes against humanity). In interpreting this section, the preparatory work NOU-2002-04, as mentioned, specifically refers to the Rome Statute, so to consult court cases from the ICC, as mentioned, is of importance. And even if a case would be eligible for the ICC, it would still be prosecuted in the Norwegian court system as long as the process is possible (in the sense that it actually does takes place) and effective, according to the preamble, and article 1 and 17 of the Rome Statute.

Aside from the direct reference to the Rome Statute in NOU-2002-04, and even though Norwegian law follows the dualistic principle in relation to international law, Norwegian law is presumed to be in compliance with international law, as long as it is not in direct conflict with it. This means that it is important that court cases from the ICC are consulted when interpreting Strl. §102, because it is natural and important with uniformity between the Norwegian courts and the ICC in the interpretation of crimes against humanity. This unity is of importance, as seen from the point of view of the

⁵⁰ Jo Stigen, *The Relationship between the International Criminal Court and national jurisdictions: the principle of complementarity*, The Raoul Wallenberg Institute Human Rights Library, Martinus Nijhoff: Leiden, 2008, p. 2.

Norwegian law because of the aforementioned exception to the dualistic principle, according to which Norwegian law is presumed to be in compliance with international law as long as it is not in direct conflict with it. But it is also important with unity in the interpretation, as seen from the perspective of the ICC, which promotes unity in the interpretation of the crimes, such as crimes against humanity, so as to achieve a just treatment of defendants, and to make sure that defendants do not get different treatment and sentencing depending on what national court system their cases go to trial in. It is of importance because then the ICC does not have to take on cases that are not processed effectively (in the sense of being in accordance with court cases from the ICC). It is also important for the national court system, for example the Norwegian court system, because otherwise the ICC will perhaps look with skepticism towards the national courts in question, and could more easily take on cases that those national courts would want to handle in the future. It will perhaps be interpreted as a stigmatizing measure towards these national courts, and a loss of prestige.

Other international tribunals, such as the ICTY and the ICTR, can be able to take on cases that concern crimes against humanity, and if they are, they *will* take on these cases, instead of the national courts. But it is nonetheless important to look also into cases from other international tribunals than the ICC, because of the exception to the dualistic principle, which states that as long as there is no direct conflict, Norwegian law must be presumed to be in accordance with international law, and to consult court cases from different tribunals, give a stronger and wider underpinning for interpreting the Norwegian Strl. §102.

10. The International Criminal Court and the situation in Uganda

The preparatory work NOU-2002-4 of Strl. §102 refers to the article 7 of the Rome Statue of the ICC, so that court cases from the ICC that employ that article are relevant in the interpretation of Strl. §102, and the presumption principle also makes cases from the ICC of relevance. Concerning the Situation in Uganda before the ICC, the Warrant for the arrest of Joseph Kony in Pre-Trial Chamber II, states that Joseph Kony (the leader of the Lord's Resistance Army/LRA) had given a "general order to attack civilians".⁵¹ There were several instances where there were attacks on civilians, and one of the attacks that took place in an IDP-camp (Internally Displaced Person) where men, women and children were bludgeoned to death, and further resulting in "wounding of...residents of the camps" and "death...of civilians".⁵² If one applies Strl. §102 to this attack, and with the focus on the term "sivibefolkning" (civilian population), the internally displaced persons could in this instance be considered civilians, and some of these civilians were wounded and some even killed. When it comes to civilians being wounded this falls without crime against humanity according to §102, but the killing of (a) person(s) falls within letter a in the section ("dreper en person" – kills a person).

Another question is whether the victims were part of a "population" (in the term 'civilian population'). They were all (civilian) members of the IDP-camp. They could be thought of as a population in their capacity of being (civilian) internally displaced persons. But this population could be seen as not having any strong internal bonds if they came from different parts of the country Uganda. That they were Ugandans is not

⁵¹ The Warrant of arrest for Joseph Kony issued on 8 July 2005, amended on 27 September 2005, in Pre-Trial Chamber II (ICC-02/04-01/05-53), The International Criminal Court (ICC), para. 26, p. 9.

⁵² Ibid., para. 24, p. 8.

necessarily enough to be considered a (civilian) population in this instance. It is necessary for a civilian population to have a distinguishing characteristic. A pre-trial chamber of the ICC said, in regards to a situation in the Republic of Kenya, that those attacked must be part of “groups distinguished by nationality, ethnicity, or other distinguishing feature”.⁵³ When it comes to those attacked in the IDP-camp, they were distinguished by being of the same nationality (Ugandans), but they were of the same nationality as the attackers (Ugandans) and the order given by Kony was general in form, so that such a characteristic in this instance cannot be seen as being enough on its own. It could be argued that in such an instance there has to be some further characteristic than that of nationality. An attack does not need to attack the whole ‘population’ either, as made clear in the case of Kamuhanda before the ICTR.⁵⁴

One could possibly divide the population of internally displaced persons in the camp, into those that with the same family, tribe or local geographical ties. Then the murder of some of them could perhaps be considered a crime against humanity, while the murder of others (who were not part of a (sizable enough?) population) would not be considered a crime against humanity (but arguably a war crime because the murders were committed during a military conflict). (Concerning the size of a population, it could be seen as “implausible and morally repulsive to draw a quantitative line” as Margaret M deGuzman writes in regards to crime against humanity and its connection with the term “widespread”).⁵⁵ No absolute line can be drawn when it comes to the size of a civilian

⁵³ Situation in the Republic of Kenya (ICC-01/09), Authorization Decision, 31 March 2010, para. 81, referred to in Margaret M. deGuzman, “Crimes Against Humanity”, *Routledge Handbook of International Criminal Law*, edited by William A. Schabas and Nadia Bernaz, Routledge: Abingdon, 2011, p. 130.

⁵⁴ Kamuhanda, (ICTR-95-54A-T), Judgment, 22 January 2004, para. 669, referred to in Margaret M. deGuzman, “Crimes Against Humanity”, *Routledge Handbook of International Criminal Law*, edited by William A. Schabas and Nadia Bernaz, Routledge: Abingdon, 2011, p. 130.

⁵⁵ Margaret M. deGuzman, “Crimes Against Humanity”, *Routledge Handbook of International Criminal Law*, edited by William A. Schabas and Nadia Bernaz, Routledge: Abingdon, 2011, p. 130.

population that fulfills the term in Strl. §102.) The warrant of Joseph Kony does not contain all the above-mentioned information, but if it would be deemed necessary, this information could perhaps be discovered in the trial before the ICC. Arguably the 'population' part of the 'civilian population' term could be fulfilled because the victims had the common characteristics of being civilian, internally displaced persons from Uganda.

The crime has also to be part of a widespread and systematic attack ("ledd i et utbredt eller systematisk angrep"). Kony had given a general order to attack civilians, and several attacks were committed, and this could fulfill 'the widespread and systematic attack' condition. But such attacks and such an order as Kony has been considered to have given, are arguably not specifically enough targeted against a particular civilian population. As has been mentioned above, the population was civilian, internally displaced persons from Uganda. But the term 'civilian population' taken together with 'part of a widespread and systematic attack', the civilian population would have to have a less general, more specific characteristic. This could have been that it was a specific tribe, or a population of a specific ethnicity, or a political (civilian) population. These specific characters are possible options for the term (civilian) population. There are none such clear defining characteristics that can be applied to LRA's murder victims in this instance, both because the order of attack on civilians were "general"⁵⁶, and in the attack being discussed there were no one population singled out or specifically attacked, but instead an attack in which all (types of) civilians were attacked. Even though the victims were 'civilian', and they were part of a 'population', as mentioned, they cannot be considered a 'civilian population' in the context of the section's condition of 'part of a

⁵⁶ The Warrant of arrest for Joseph Kony issued on 8 July 2005, amended on 27 September 2005, in Pre-Trial Chamber II (ICC-02/04-01/05-53), The International Criminal Court (ICC), para. 26, p. 9.

widespread and systematic attack'. Thus in this instance mentioned in the warrant for Joseph Kony, the crime against humanity as formulated in StrI §102, is not applicable. The case against Joseph Kony has not been decided, and thus the ICC has not drawn its conclusion, because Kony has not been apprehended and the court has not decided the case in absentia.

When interpreting the term 'civilian population' that is used in both Str. §102 and article 7 of the Rome Statute, the question arises of how narrow or wide the interpretation should be. In the Kupreskic-case before ICTY, it was stated that it "would seem that a wide definition of "civilian" and "population" is intended."⁵⁷ A wide interpretation or definition can according to this be made of the condition ('civilian population'), more easily fulfilling it in regards to an attack, as long as the attack is not a singular attack without any connection to a wider attack.⁵⁸ Even though the condition of a civilian population may be more easily fulfilled according to legal tradition, it is still of importance to find out when it is fulfilled, because without this condition being fulfilled, the section cannot be applied, even though all the other conditions of crime(s) against humanity are fulfilled.

11. The International Criminal Court and the Situation in Darfur in Sudan

According to Pre-Trial Chamber I of the ICC in the Warrant for the Arrest of Ahmad Harun "there are reasonable grounds to believe that the Sudanese Armed Forces and the

⁵⁷ Kupreskic (ICTY-95-16), Judgment 14 January 2000, para. 547, referred to in Margaret M. deGuzman, "Crimes Against Humanity", *Routledge Handbook of International Criminal Law*, edited by William A. Schabas and Nadia Bernaz, Routledge: Abingdon, 2011, pp. 130, 137.

⁵⁸ Kunarac, (ICTY-96-23/1-A), Judgment, 12 June 2002, para. 90, referred to in Margaret M. deGuzman, "Crimes Against Humanity", *Routledge Handbook of International Criminal Law*, edited by William A. Schabas and Nadia Bernaz, Routledge: Abingdon, 2011, p. 130.

Militia/Janjaweed (attacked) the towns of Kodom, Bindisi, Mukjar, Arawala and surrounding areas over an extensive period of time...”⁵⁹ There was no rebel activities in these towns, and the attacked civilians took no part in the hostilities. Pre-Trial Chamber I holds that the Sudanese Armed Forces and the Militia/Janjaweed committed criminal acts such as murder of civilians, rapes and outrages upon the personal dignity of women and girls. The attacks were intentionally directed against the civilian populations (Pre-Trial Chamber I uses this term) of the Fur, Zaghawa and Masalit. There also occurred the destruction of property belonging to these populations and pillaging of the towns. During the attacks “persecution, murders, forcible transfers, imprisonment or severe deprivation of liberty, acts of torture, rape and other inhumane acts”⁶⁰ took place against the aforementioned populations. These acts were, according to the Pre-Trial Chamber I of the ICC, crimes against humanity according to the Rome Statute 7(1)a, 7(1)d, 7(1)e, 7(1)f, 7(1)g, 7(1)h and 7(1)k. These subsections are parallel to Strl. §102 a), §102 d), §102 e), §102 f), §102 g), §102 h) and §102 k). As previously mentioned, the preparatory work NOU-2002-04. Ny Straffelov §16-3, refers to the Rome Statute, so it is worthwhile to look into such instances as this one here being discussed, to clarify when the term “civilian population” is applicable under the Norwegian section.

Regarding Strl. §102 and its term ‘civilian population’ (sivilbefolkning), the warrant states that those who were attacked were civilians that had taken no part in the hostilities. According to this, the condition of “civilian” must be fulfilled. When it comes to the condition “population”, it has, according the Authorization Decision from the ICC regarding the Situation in the Republic of Kenya (ICC-01/09), to have a distinguishing feature. This pre-trial chamber of the ICC stated that the victims must belong to “groups

⁵⁹ Warrant for the arrest of Ahmad Harun issued on 27 April 2007, in Pre-Trial Chamber I of the ICC, (ICC-02/05-01/07-2), The International Criminal Court (ICC), p. 3/16.

⁶⁰ Ibid., p. 4/16.

distinguished by nationality, ethnicity, or other distinguishing features.”⁶¹ For a group to fulfill the ‘population’ part of the condition ‘civilian population’, it has to have within and between itself at least one distinguishing feature. The distinguishing feature has to be something that establishes a potential more permanent connection between the members of the group. As is mentioned in the Authorization Decision these features could be of national, ethnic or of other elements. A national distinguishing feature could encompass several different ethnic distinguishing features. It could therefore be argued that a distinguishing feature that is national is not necessarily enough in every situation. It could arguably play a part whether the attacking group and the victims are of the same nationality, and whether the group of victims was targeted because of the members’ nationality. How many inhabitants the nation has all in all could possibly play in, because the fewer nationals the nation has, the more capable the feature is of being a distinguishing characteristic.

Margaret M. deGuzman writes that the statement of the pre-trial chamber of the ICC “suggests a requirement of discriminatory group targeting and leaves open which “distinguishing features” are sufficient. Does a group of peacekeepers qualify, for example?”⁶² Whether it is a requirement that the targeting of the group is discriminatory in nature, could be discussed. Arguably, the solution could be that it does not necessarily have had to be discriminatory, but for an attack to be considered a crime against humanity, one or several (civilian) populations with distinguishing features have to be found in or among the victims. In regards to if any distinguishing feature is sufficient, or

⁶¹ Situation in the Republic of Kenya (ICC-01/09), Authorization Decision, 31 March 2010, para. 81, referred to in Margaret M. deGuzman, “Crimes Against Humanity”, *Routledge Handbook of International Criminal Law*, edited by William A. Schabas and Nadia Bernaz, Routledge: Abingdon, 2011, p. 132.

⁶² Margaret M. deGuzman, “Crimes Against Humanity”, *Routledge Handbook of International Criminal Law*, edited by William A. Schabas and Nadia Bernaz, Routledge: Abingdon, 2011, p. 132.

if not, what distinguishing features are, it can perhaps be said that the distinguishing feature has to be clear, strong and permanent to be fulfill the condition of (civilian) population. It must be clear in the sense that the distinguishing feature properly separates the group/population from other groups/populations, when considered in light of exactly that distinguishing feature. It has to be strong to unite the group/population into a coherent whole, in the sense that it must be felt and understood by the victims as a natural connection (religious, ethnic or other) within the group, and the members must in one way feel or understand that the group can naturally belong, or at least be seen to belong, together. And the distinguishing feature must perhaps also be seen as being permanent to let the group be considered a population, so that the distinguishing feature is not simply a temporary, random or ephemeral connection.

Those attacked were of the Fur, Zaghawa and Masalit ethnicities, so that here the distinguishing features are arguably present, because within each of the ethnic groups there exists a strong enough connection (ethnicity), so that each group is a population on its own, and the condition of "population" is therefore fulfilled for each group. The "civilian" part of the condition must also be fulfilled because the members of these ethnic groups were not combatants but rather civilians, and together this means that those attacked can be considered 'civilian populations'. In the warrant it is also stated that it was these groups (the Fur, Zaghawa and Masalit ethnicities) that the attacks were directed against. The condition of the attack having to be directed against these civilian populations, is therefore fulfilled as well.

12. The International Criminal Court and the Situation in the Republic of Congo

In the warrant against Germain Katanga, the alleged leader of FRPI (the Force de résistance patriotique en Ituri [Patriotic Resistance Force in Ituri], it is stated that there occurred an attack against the village of Bogoro. During and after this attack “several criminal acts against civilians primarily of Hema ethnicity” were committed. These included, and the ICC Pre-Trial Chamber I claim they are crimes against humanity – “murder of about 200 civilians...causing of serious harm to civilians...arresting, threatening with weapons and imprisoning civilians in a room filled with corpses...pillaging...and the sexual enslavement of several women and girls”.⁶³ Pre-Trial Chamber I of the ICC holds that “there are reasonable grounds to believe that Germain Katanga is criminally responsible under article 25(3)a or, in the alternative, under article 25(3)b of the (Rome) Statute, for...” murder as a crime against humanity under article 7(1)a under the Rome Statute, inhumane acts as a crime against humanity (article 7(1)k), and sexual slavery as a crime against humanity (article 7(1)g).⁶⁴

In the attack on the village Bogoro, the crimes were committed against civilians of primarily the Hema ethnicity. The condition of “civilian” in “civilian population” in Strl. §102 would be fulfilled, as is made clear from the warrant. The remaining question is whether the ‘population’ condition would be fulfilled. The context of the term ‘civilian population’ in Strl. §102 is of importance: ‘attack directed against a civilian population’ (‘angrep rettet mot en sivilbefolkning’). The crimes in Bogoro were primarily committed against civilians of the Hema ethnicity, but not only them, and ICC Pre-Trial Chamber I states that “there are reasonable grounds to believe the attack directed against the

⁶³ Warrant of arrest for Germain Katanga issued on 2 July 2007, in Pre-Trial Chamber I of the ICC, (ICC-01/04-01/07), The International Criminal Court (ICC), p. 4/7.

⁶⁴ Ibid., p. 6/7.

village of Bogoro was indiscriminate”.⁶⁵ The word indiscriminate can be interpreted as when “an indiscriminate action is done without thought about what the result may be, especially when it causes people to be harmed”⁶⁶, according to the definition in Oxford Advanced Learner’s Dictionary. This meaning is perhaps the common meaning in everyday parlance, but it has a somewhat subjective significance, and would perhaps be misplaced in a legal text such as a warrant. It is more probable that what was meant by “indiscriminate” was that the attack was committed without distinction between persons or groups. If then the attack on Bogoro was committed without distinction between persons or groups, the question would become whether the fact that not only civilians of the Hema ethnicity but also other civilians were targeted, make it so that the attack cannot have been seen to having been directed against a civilian population (Strl. §102). In *Prosecutor v. Kunarac*, that was before the International Criminal Tribunal for the Former Yugoslavia (ICTY), it is pointed out that the attack must be directed against a civilian population, “that is, the civilian population must be the primary target of the attack.”⁶⁷ That a similar definition as that in Article 7 in the Rome Statute of the ICC, and more importantly, the Strl. §102 of crime against humanity, in an international tribunal such as the ICTY is, is interpreted in this way, is a strong argument for also interpreting in the other sections in the same way.

One could then ask whether the fact that also other civilians were attacked, means that the attack would not be considered to have been against those of the Hema ethnicity, who could arguably in themselves be considered a civilian population. Those

⁶⁵ Ibid., p. 4/7.

⁶⁶ *Oxford Advanced Learner’s Dictionary*, 7th Edition, Chief Editor Sally Wehmeier, Oxford University Press: Oxford, 2005, p. 791.

⁶⁷ *Prosecutor v. Kunarac*, Case No. IT-96-23, Judgment, 22 February 2001, para. 421, referred to in Margaret M. deGuzman, “Crimes against humanity”, *Research Handbook on International Criminal Law*, edited by Bartram S. Brown, Edward Elgar Publishing Limited: Cheltenham, 2001, p. 73.

of the Hema ethnicity could arguably be considered to be a social population because it is clear that they were civilians (as stated in the warrant), and they could be seen as a population because they shared the same ethnicity (Hema). Even if also other civilians were attacked, the social population of the Hema group could still be considered the target. In the context of Strl. §102 the intent behind the attack then becomes important, in being able to see whether the civilians being attacked were a social population. If, as mentioned, it was just the Hema ethnicity/group that was targeted, the condition of social population in Strl. §102 is fulfilled, but if it was all those in the area (Bogoro) were targeted in the attack, then further research of the facts is necessary to determine whether this condition is fulfilled. Even if other civilians were attacked does not mean that they were targeted per se, so that the condition of social population would be fulfilled even if other civilians were attacked, because the target would be the social population itself. This means that in this instance the condition of social population would have been fulfilled if it was the Hema ethnicity that was targeted, even if other civilians were actually also attacked in the attack for example because they were in the area.

But in this instance it seems clear that everyone in Bogoro were targeted, as can be shown by the statement that it was an indiscriminate attack. This means that the target was everyone in Bogoro, and not just those of the Hema ethnicity, and thus the ethnicity of those of the Hema ethnicity cannot make them a social population on their own in the context of Strl. §102 – all the civilians in Bogoro will have to be considered a civilian population (together). The civilians in Bogoro would have to have at least another common characteristic/distinguishing feature than the same ethnicity, which they lack. That a distinguishing feature is necessary for a group to be considered a population is

made clear in the Authorization Decision from the ICC regarding the Situation in the Republic of Kenya.⁶⁸ This *could* be that they were of *close* ethnicities or that they were of the same geographical group, or other common characteristics. The distinguishing feature of geographical group could here arguably be fulfilled, but there is not enough information in this warrant to conclude on this in this specific case. The (other) civilians could be of the place, but they could also have been refugees. If that was the case, then yet other distinguishing feature could be relevant, such as religion or political affiliation. But as mentioned, the information in the warrant for Germain Katanga is too incomplete to conclude.

13. The attack on the Norwegian Labor Party's youth organization (AUF) on Utøya in Norway on 22nd July 2011

The attack on the camp for members of the Norwegian Labor Party's youth organization AUF (Arbeiderpartiets Ungdomsfylking) on Utøya in Norway on 22nd July 2011 has made the issue of crime against humanity and what constitutes a civilian population relevant in relation to Norwegian society. Strl. §102 could possibly be applied to this act, but the indictment against the offender Anders Behring Breivik, applies other paragraphs. (The offender also detonated a bomb next to government buildings, and has also been indicted for this, but this will not be further discussed here.)

The indictment states that the relevant sections, concerning the attack on Utøya are:
"The (Norwegian) Criminal Statute (Straffeloven 22. mai, nr. 10, 1902) §147a first

⁶⁸ Situation in the Republic of Kenya (ICC-01/09), Authorization Decision, 31 March 2010, para. 81, referred to in Margaret M deGuzman, "Crimes Against Humanity", *Routledge Handbook of International Criminal Law*, edited by William A. Schabas and Nadia Bernaz, Routledge: Abingdon, 2011, p. 130.

paragraph letter b, cf. § 233 first and second paragraph, for having committed an act of terrorism, by transgressing against the Criminal Statute (Straffeloven 22. mai, nr. 10, 1902) §233 first and second paragraph (premeditated homicide and aggravating circumstances exist), with the intent to create serious fear in a population.”⁶⁹ (My translation.)

Even if the Strl. §102 is not applied, it could hypothetically be used in such a situation, and then the question would be whether the members of the AUF-camp could be considered to be a civilian group (sivilbefolkning). The individual members of AUF share the similarity that they are members of this political youth organization. Is this enough to be a distinguishing characteristic? This characteristic is political in nature, but the members of AUF arguably share another common characteristic, that of their age. Regular members of AUF are under 35 years of age, while supporting members can be older.⁷⁰ There is no minimum age limit. Could then the age of the members be seen as a distinguishing characteristic? If one includes also supporting members (who were over 35 years of age) the characteristic is clearly too wide, so that it cannot be seen as a distinguishing characteristic. But most of the individuals that were present at the Utøya camp, and most of those who ultimately were victims of the acts on the island, were regular members of AUF. Can these individuals who were under the age of 35 be seen to share the distinguishing characteristic of age? The answer must be no, because the age limit is too high. The nationality or ethnicity could be discussed as being distinguishing characteristics, but the nationality of the members were Norwegian, and the offender was himself Norwegian, and the acts took place in Norway, so this characteristic cannot

⁶⁹ Nettavisen, <http://www.nettavisen.no/nyheter/article3351181.ece>, 07/03/2012.

⁷⁰ AUF.no, <http://auf.no/-/sandbox/show?ref=mst>, 16/04/2012.

be seen as a distinguishing characteristic, as it is shared by the great majority of the inhabitants of the country where the acts took place. The ethnicities of the members were not only ethnically Norwegian, but instead the attendees of the camp arguably had a more mixed ethnic composition than what is the norm in Norwegian society. Still the different ethnicities do not play a defining part when it comes to distinguishing characteristics, because even if the members were of different ethnicities, they were still nationals of Norway, so that the different ethnicities are no hindrance to seeing them as having a distinguishing characteristic. But the Norwegian nationality, as already mentioned, cannot be seen as a distinguishing characteristic.

The political affiliation of being a member of the Norwegian Labor Party's youth organization remains as a possible distinguishing characteristic. The political affiliation can be seen to create and sustain such a connection between the members as is necessary for it being a distinguishing characteristic. This can be based in the fact that the connection is permanent and strong enough to be considered a distinguishing characteristic because the members' political affiliation had manifested itself in an actual membership of the organization of AUF, and further enhanced or underlined by the participation in the youth camp that is the most, or at least, one of the most important events in the year for the organization.

That the AUF members on Utøya can be seen to have the distinguishing characteristic of political affiliation fulfills the condition of civilian population (sivilbefolkning) in Strl. §102, so that the section could be applied to the acts committed on Utøya, as long as the other conditions are fulfilled. (But other sections were used in the indictment, as has been shown.)

It has been argued that Strl. §102 cannot be used because the perpetrator acted on his own, and according to the section the act has to be committed as part of a widespread and systematic attack (“som ledd i et utbredt og systematisk angrep”). One argument against this could be that the attack on Utøya must be seen together with the attack on the government buildings that took place before. But because it is not fully clear whether the section can be applied, it is more natural to use Strl. 1902 §§147 and 233. Strl. 2005 §102 can give up to 30 years in prison, while 21 years in prison is the maximum that can be given according to Strl. 1902 §§147 and 223. The perpetrator could also be sentenced after these sections in either law to preventive custody (forvaring). Strl. 1902 §39 can be applied regarding preventive custody when there is a real danger (nærliggende fare) that the perpetrator will commit a similar, new crime. According to Strl. 1902 §39e, the maximum that can be given is 21 years of preventive custody, but after petition (begjæring) from the prosecution the court can pass an extension of preventive custody for five years at a time. If the prosecution applied Strl. 2005 §102 the maximum preventive custody that the perpetrator could be sentenced to would be 21 years, or he could be sentenced to prison for 30 years. If he was sentenced to the longer prison sentence, he would *have* to be released after those maximum 30 years, but if preventive custody was applied then he *could* be kept in prison longer, as long as the conditions in Strl. 1902 §§39 and 39e were fulfilled, theoretically for his whole life. And because the crime committed is so serious, and there is a perhaps fear of the perpetrator committing a similar crime in the future, the prosecution could prefer preventive custody. And if they did, there would be no added gain by applying Strl. 2005 §102, because the preventive custody could not be longer than if Strl. 1902 §§147 and 223 were applied. But instead the condition of Strl. 2005 §102 of the act being part of a

widespread and systematic attack could pose difficulties, while it is clear that Strl. 1902 §§147 and 223 are applicable.⁷¹

As is mentioned in the introduction, it is worth noticing that it is still undecided by the court whether the perpetrator, Anders Bering Breivik, should be considered criminally insane (strafferettslig utilregnelig) or not. If he is considered to be criminally insane, he cannot be sentenced to imprisonment or protective custody (forvaring). The section could, however, still have been relevant, because it would still be necessary to prove that he transgressed against all of the components of Strl. §102. He could then be sentenced to compulsory psychiatric care (tvungen psykiatrisk helsevern) (Str. 1902 §39, first paragraph), as long as he would be considered psychotic (psykotisk) when the offence took place (Strl. 1902 §44, first paragraph).

14. Conclusion

The term 'civilian population' in Strl. §102 must be interpreted according to the understanding of the word 'civilian' that mainly means non-military, but is in fact more many-faceted than that, and the word 'population' that must contain a minimum of individuals and within this group there must exist a distinguishing feature (that can be ethnicity, race, nationality, religion, and/or politics etc.) for it to be considered a population. When interpreting the section it is important to follow/use the sources of law, that include first looking into the linguistic meaning of Strl. §102 to also get a better understanding of the legal meaning. Then the preparatory works must be consulted, and

⁷¹ Aftenposten.no, <http://www.aftenposten.no/nyheter/iriks/article4184191.ece#.T5VaY1FpuqQ>, 23/04/2012.

here NOU-2002-04 is of great importance, and it refers to the Rome Statute of the ICC. The ICC is an international tribunal that deals with (among other things) crimes against humanity, and because of the preparatory work refers to the Rome Statute of the ICC and because of the presumption principle, cases from this tribunal, as well as from other international tribunals that deal with crimes against humanity, must be examined. The presumption principle plays a part in using cases from international tribunals in the interpretation of Strl. §102, because according to this principle Norwegian law is presumed to be in accordance with international law, and Norwegian courts should attempt to interpret national law so that it does not come into conflict with international law. Opinions in legal theory must be consulted, as well as an assessment (*reelle hensyn*) of the term 'civilian population' itself. Concerning the assessment of the term, it is important that the term is not seen as being too wide, and a strict interpretation (*innskrenkende tolkning*) is to prefer to a wide one (*utvidende tolkning*), in part because of the principle of legality. There is arguably a danger with the fact that the preparatory work refers to international law and an international tribunal (the ICC), because through this, the development of the national law is to some extent moved away from the national law system to an international one, and the Norwegian courts retain less control of the section's and the term's interpretation. But this is perhaps not a great danger in itself, because through the use of the interpretation of the term from international law, the understanding of crimes against humanity attains a more uniform form. This is positive from a macro- or international perspective because this helps to ensure that individuals that are accused of crimes against humanity get an equal treatment before an international tribunal (such as the ICC) and a national court (such as a Norwegian court). This is an important development that needs to be enhanced, so that in the final analysis it is in fact more positive than negative that national

(Norwegian) law looks to international law in this way. Also, the international courts specialize in dealing with 'international crimes' such as crimes against humanity, so that they have attained expertise in interpreting and applying the section, and through this the national courts can gain by applying these interpretations.

The comparison between the section about genocide in the Norwegian Criminal Statute (Strl. §101) and the section about crimes against humanity (Strl. §102) in the same statute, shows that crimes against humanity can often be interpreted as being wider than the crime of genocide. This shows that Strl. §102 can be applied more often, and helps to define the width of the application of 'civilian population'. Concerning the definition of the population, the International Military Tribunal in Nuremberg showed that it is clearly too wide to consider all those who were opposed to the Nazi party as a population, but that those who were Jewish can be seen as being a population. This shows that group can be a (civilian) population as long as there exists a distinguishing feature within that population. Cases before the ICTY shows that a distinguishing feature can be to belong to the same city, but this is generally too weak a connection. That individuals are in one defined area *can* strengthen the view of them as a population, but on its own it is never enough. Cases before the ICTR shows that even though a population does not have its own language or a distinct culture from the rest of the country's population, it can still fulfill the condition of a (civilian) population. In the case of the Tutsis, this was achieved because of identification of ethnicity through laws, the country's constitution and customary rules. A(n ethnic) group can be considered to be a (civilian) population as long as it is *perceived* as one over time, as long as the perception is constant, lasts over time and is shared by a large group of people.

As is shown in regards to the situation in Uganda before the ICC, to be of a certain nationality is not necessarily enough to fulfill 'civilian population', especially when the attackers are of the same nationality. Family, tribe or local geographical ties can be distinguishing features as well. Concerning the size of the population, a quantitative measure cannot be construed, but it has not to be a too small group. As shown in regards to the ICC and the situation in Darfur in Sudan, it can be argued that the fewer members a population has, the more likely is it that the nationality can be a distinguishing feature, because then that feature becomes more "unique". Cases before the ICC that dealt with the situation in the Republic of Congo, underlines that the civilian population has to be the primary target of the attack. 'Civilian population' can be fulfilled even if non-members of the population are attacked, as long as the attack is directed towards the civilian population in question. In regards to the attack on the Labor Party's youth camp at Utøya, age *can* be a distinguishing feature, but the age limit or category must then be very limited.

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